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IN THE UTAH COURT OF APPEALS

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GREG J. HANSEN,

Petitioner and Appellant,

Case No. 20050464-CA

vs.

JULIE ANN KIK, fka HANSEN,

Respondent and Appellee.

-----oo0oo-----

REPLY BRIEF OF APPELLANT

APPEAL FROM THE AMENDED ORDER ON ORDER TO
SHOW CAUSE AND JUDGMENT ENTERED BY THE SIXTH
JUDICIAL DISTRICT COURT FOR THE COUNTY OF SANPETE IN
THE STATE OF UTAH THE HONORABLE PAUL LYMAN PRESIDING

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UTAH APPELLATE COURT

FEB 06 2006

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THE PETITIONER'S APPEAL FROM THE AMENDED ORDER ON ORDER TO SHOW CAUSE AND JUDGMENT WAS TIMELY FILED

The Appellee, Julie (Hansen) Kik, asserts in her Brief of Appellee that this appeal should be dismissed as untimely because the original Order on Order to Show Cause & Judgment was entered on November 16, 2004, and the Notice of Appeal was filed on May 18, 2005, following the entry of the Amended Order on Order to Show Cause & Judgment on May 5, 2005.

The original Order on Order to Show Cause & Judgment, submitted by the Respondent, Julie (Hansen) Kik, and signed and entered by the trial court on November 16, 2004, awarded judgment to the Petitioner, Greg J. Hansen, and against the Respondent, Julie (Hansen) Kik in the amount of \$8,172.00. *R. 89-94.*

On April 21, 2005, the Respondent, Julie (Hansen) Kik, filed her Motion to Amend Order on Order to Show Cause & Judgment Nunc Pro Tunc. *R. 112-115.* The motion asserted that the Respondent's counsel had made a "clerical" error in the preparation of the judgment by "inadvertently"

awarding the Petitioner judgment against the Respondent. The Respondent's motion asserted that the judgment should be changed to reflect that the Respondent is awarded judgment in the sum of \$8,172.00, against the Petitioner, rather than a judgment in favor of the Petitioner in the sum of \$8,172.00. The motion asserted that the judgment should be amended "*nunc pro tunc*."

On April 29, 2005, the Petitioner, Greg J. Hansen, filed his objections to the amendment of the judgment *nunc pro tunc* acknowledging that the judgment should be amended to award the Respondent judgment against the Petitioner as the trial court had ruled at the hearing in October, 2005, but asserted that the prior judgment in his favor be vacated and that the amended judgment not be entered *nunc pro tunc*. *R. 119-121*.

On May 5, 2005, the trial court denied the Petitioner's objections to the motion to amend the judgment and signed the Amended Order on Order to Show Cause & Judgment stating, "There will not be two judgments outstanding, once the amended order is made "*nunc pro tunc*."

On May 5, 2005, the trial court signed and entered the Amended Order on Order to Show Cause & Judgment. Paragraph 9, of the

amended findings of fact and paragraph 1, of the amended judgment awarded the Respondent judgment against the Petitioner for \$8,172.00.

The time for appeal should be taken from the entry of the amended judgment against the Petitioner on May 5, 2005. The original judgment, entered November 16, 2004, had erroneously awarded the Petitioner judgment against the Respondent in the amount of \$8,172.00.

Trial courts often awarded judgments to, or against, one or more parties to an action and these judgments may be offsetting.

A formal order signed and entered upon the erroneous assumption that it conformed to a direction of the trial court made after a hearing on the merits is more than a mere inadvertence. *Dixon v. Dixon*, 240 P.2d 1211 (Utah 1952.)

In this case the entry by the trial court of the original order and judgment, granting the Petitioner a judgment against the Respondent, was more than a mere inadvertence. The judgment of November 16, 2004, was awarded to the wrong party. The amended judgment, entered on May 5, 2005, by the trial court changed the party that was awarded the judgment for \$8,172.00. The amendment removed the judgment awarded erroneously to

the Petitioner and awarded the judgment to the other party, the Respondent. In this case the bleated entry of the amended judgment changed materially in that the Petitioner was awarded a judgment on November 16, 2004, and the amended judgment changed party to whom the judgment of \$8,172.00, was awarded to the Respondent. The actual character and substance of the judgment was changed awarding the Respondent judgment of \$8,172.00, and substituting that judgment for the November 16, 2004, judgment rendered in favor of the Petitioner.

The judgment entered November 16, 2004, awarded the Petitioner judgment against the Respondent for \$8,172.00. The Respondent was awarded judgment in the amount of \$6,855.00. The Petitioner, upon the entry of the judgment upon the record in his favor on November 16, 2004, could have executed upon the judgment, or otherwise off-set the recorded judgment in his favor against the judgment entered for the Respondent. The amended judgment decreased the judgment in favor of the Petitioner and increased the value of the judgment awarded to the Respondent by the November 16, 2004, judgment. The corrected judgment changed the party the judgment was awarded to, vacated the erroneous judgment awarded the

Petitioner and increased the value of the judgment awarded to the Respondent.

Moreover, the trial court substituted or vacated the Order on Order to Show Cause & Judgment with the Amended Order on Order to Show Cause & Judgment entered on May 5, 2005. The Respondent's motion to amend the erroneous judgment entered in favor of the Petitioner on November 16, 2004, was granted by the trial court.

In *Sittner v. Schriever*, 2 P.3d 442 (Utah 2000), the Utah Supreme Court had occasion to consider the effect of a corrected judgment upon the timeliness of a Notice of Appeal under Rule 60(b), of the Utah Rules of Civil Procedure. The Court, after citing authority for the proposition that normally a motion under Rule 60(b), does not extend the time within which an appeal must be taken stated,

However, the period in which to appeal a final judgment is measured differently when the trial court *grants* the rule 60(b) motion. Specifically, "[I]f ... the court grants the [rule 60(b) motion and enters a new judgment, the time for appeal will date from the entry of that judgment." (internal citations omitted.) Indeed, a final, appealable order results "when the court not only relieves a party of judgment, but enters a corrected judgment so that there is nothing further to be decided by the

district court.” 12 *Moore's Federal Practice Section 60.68[2]*
(3d ed. 1997).

In this case, on May 5, 2005, the trial court relieved the Respondent of the judgment it had entered against her in favor of the Petitioner for \$8,172.00, when it entered the amended judgment. The trial court changed the party it had awarded one of the judgments to in the original judgment of November 16, 2004. The May 5, 2005, amended judgment changed the character of the November 16, 2004, judgment, by changing the party to whom that judgment was awarded, and the value of the judgment rendered and recorded against the Petitioner and in favor of the Respondent.

**THE TRIAL COURT WAS WITHOUT JURISDICTION TO ENTER
THE ORIGINAL JUDGMENT AND THE AMENDED JUDGMENT
BECAUSE THE ACTION WAS PROHIBITED BY AND VIOLATED
THE STATUTE OF LIMITATIONS, UTAH CODE ANNOTATED,
SECTION 78-12-22, AND THE JUDGMENTS ARE VOID**

The trial court was without jurisdiction to enter judgment against the Petitioner, Greg Hansen, upon the motion for order to show cause of the Respondent, Julie (Hansen) Kik, because the motion was filed

more than eight years after the entry of the decree of divorce in violation of the Statute of Limitations, Utah Code Annotated, Section 78-12-22.

The judgment entered against Greg J. Hansen by the trial court, at the demand of the Respondent, Julie (Hansen) Kik, is void and time barred because the Respondent's claims were not brought by her until a date beyond the running of the eight year statute of limitations embodied in Utah Code Annotated, Section 78-12-22. The trial court was without jurisdiction to enter judgments against the Petitioner, both the erroneous judgment of the trial court entered on November 16, 2004, and the amended judgment entered on May 5, 2005, are void and the judgments should be reversed and vacated.

A trial court's jurisdiction is a question of law and a correction of error standard is applied. *Glasmann v. Second Dist Court ex rel Weber County*, 80 Utah 1, 12 P.2d 361 (1932); *Kramer v. Pixton*, 268 P. 1029 (Utah 1928). The statute of limitations embodied in Utah Code Annotated, Section 78-12-22, removes the trial court's jurisdiction to enter judgment against the Petitioner once the eight years has expired within which the

Respondent could have brought her action against the Petitioner upon the decree of divorce.

The lack of personal jurisdiction over the Petitioner in this cause, as well as the lack of jurisdiction of the subject matter of the litigation, can be raised at any time, including upon appeal to this Court. *Glasmann v. Second Dist. Court ex rel. Weber County*, 80 Utah 1, 12 P.2d 361 (1932).

The issue of whether a statute of limitations has expired is a question of law and the Court of Appeals reviews the conclusion for correctness, giving no particular deference to the trial court. *Kessimakis v. Kessimakis*, 977 P.2d 1226 (Utah App. 1999); *Gramlich v. Munsey*, 838 P.2d 1131, 1132 (Utah 1992); *State v. Pena* 869 P.2d 932, 936 (Utah 1994).

Utah Code Annotated, Section 78-12-22, provides:

An action may be brought within eight years . . . upon a judgment or decree of any court of the United States, or of any state . . . within the United States.

In this action, the Decree of Divorce was entered in the trial court on November 15, 1994. *R. 60-66*. The case file reflects that no

pleadings were filed in the action following the entry of the decree until September 30, 2004, when Julie Kik first filed her motion for order to show cause requesting Mr. Hansen be held in contempt, requesting judgment for her equity in the marital residence and the return of personal property awarded to her or, in the alternative, a money judgment for the value of the personal property. *R.* 67-75.

The statute of limitations expired on the claims of Julie (Hansen) Kik for \$4,000.00, equity in the marital residence and upon her claim for personal property on Exhibit 1, to the Decree of Divorce, on November 14, 2002.¹

Generally, “Statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.” *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989). Statutes of limitations “are designed to promote justice by preventing surprises through the revival of claims that have been allowed to

¹ The Decree of Divorce does not have an Exhibit 1. attached to it in the trial court's file, identifying items of personal property which the Respondent can now enforce. The Exhibit 1, offered by the Respondent and admitted at trial was “retyped” the day before the hearing and the Respondent “guessed” as to the value of the personal property identified thereon. *Tr.* 7, 19, 14-31.

slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983).

It has been a long held proposition of law that a decree of divorce is subject to the eight year statute of limitations found in Utah Code Annotated, Section 78-12-22. Utah R. Civ. P. 54(a), defines a “judgment” as “including a decree and any order from which an appeal lies.”

In *Seeley v. Park*, 532 P.2d 684 (Utah 1975), the Utah Supreme Court directly visited the issue of whether the eight year statute of limitations applies to decrees and orders in divorce actions and reviewed decades old precedent establishing that the limitation applies. See *Beesley v. Badger*, 240 P. 458 (Utah 1925), *Openshaw v. Openshaw*, 144 P.2d 528 (Utah 1943).

The rule has been recently reaffirmed by this Court in *Kessimakis v. Kessimakis*, 977 P.2d 1226 (Utah App. 1999), when the Court had occasion to consider facts nearly identical to those in this case. In *Kessimakis*, *id.*, the former wife requested enforcement of a provision of the decree of divorce ordering her former husband to execute and deliver

appropriate documents evidencing transfer of her interest in a closely held corporation. This Court, in determining that the former wife's enforcement claims were barred by the eight year statute of limitations stated:

Ms. Kessimakis's action also presents a request for enforcement of the decree's requirement that Mr. Kessimakis "execute and deliver appropriate instruments evidencing the transfer" of an interest in the Corporation to Ms. Kessimakis. This provision of the decree created a judgment in Ms. Kessimakis's favor. *See* Utah R. Civ. P. 54(a) (defining "judgment" as "includ[ing] a decree and any order from which an appeal lies") Ms. Kessimakis's action is thus subject to the eight year statute of limitations. *See* Utah Code Ann. Section 78-12-22(1)(1996) ("An action may be brought within eight years . . . upon a judgment or decree of any court of the United States, or of any state . . . within the United States.")

Statutes of limitations reflect our understanding that a party will generally choose to pursue a valid claim, rather than waiting indefinitely to do so. *See* 51 Am. Jur.2 *Limitation of Actions* Section 17 (1970). They "attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses." *Lund v. Hall*, 938 P.2d 285, 291 (Utah 1997) (quoting *Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971)). In this case, the passage of time has created precisely those difficulties: the parties possess little evidence, documentary or otherwise, and several potential witnesses have died.

....

We agree with the trial court that Ms. Kessimakis's effort to require Mr. Kessimakis to deliver documents of title showing her interest in the Corporation is barred by the eight year statute of limitations. *See* Utah Code Ann. Section 78-12-22(1) (1996).

In this action the Decree of Divorce was entered on November 15, 1994, nearly 10 years before Ms. (Hansen) Kik chose to file her claim

against Mr. Hansen for the \$4,000.00, equity in the marital residence and her claim for unidentified items of personal property. She filed her enforcement action on September 30, 2004.

The trial court lost jurisdiction to enforce the decree of divorce when the eight year statute of limitations for enforcement expired. The judgment against the Petitioner, Greg Hansen, entered by the trial court on November 16, 2005, is void because the trial court was without jurisdiction to enter the judgment. The amended judgment entered by the trial court on May 5, 2005, was and is void because the amended judgment cannot become a valid judgment because of the amendment to the original void judgment entered by the trial court without jurisdiction.

CONCLUSION

The trial court was without jurisdiction to enter a judgment against the Petitioner, Greg Hansen, once the eight year statute of limitations expired.

The trial court granted the Respondent's Motion to Amend the Order on Order to Show Cause and Judgment on May 5, 2005. The amendment changed the party that was awarded judgment for \$8,172.00,

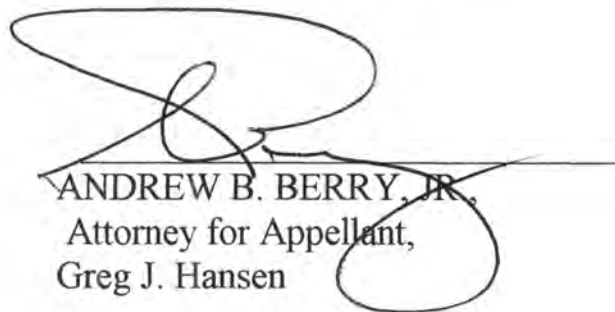
from the Petitioner to the Respondent. The amended judgment increased the value of the recorded judgment for the Respondent and decreased the value of the recorded judgment for the Petitioner. The character and substance of the judgment was changed by the amendment of the November 16, 2004, judgment and the entry on the record of the corrected judgment.

The trial court substituted the erroneous judgment entered on November 16, 2004, with the corrected judgment entered on May 5, 2005. The Petitioner filed his Notice of Appeal challenging the corrected judgment awarded the Respondent on May 18, 2005.

The amended judgment of May 5, 2005, correcting the erroneous judgment entered by the trial court on November 16, 2004, is void because the trial court was without jurisdiction to enter the judgment on November 16, 2004. The statute of limitations had expired depriving the trial court of jurisdiction to entertain an action on the decree of divorce entered November 15, 1994. Thus, both the judgment and the amendment judgment are void.

The void judgment of the trial court, entered without subject matter jurisdiction, should be reversed and vacated.

RESPECTFULLY SUBMITTED this 6th day of February, 2006.



ANDREW B. BERRY, JR.
Attorney for Appellant,
Greg J. Hansen

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 6th day of February, 2006, I served upon and mailed, postage prepaid and by first class mail, two (2), true and correct copy of the foregoing Reply Brief of Appellant to the following:

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